Pemungut Duti Harta Pusaka v Muthukamaru a/l Veeriah (Executor of the estate of Veeriah a/l Savu, deceased)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–01–148–1995
SHAIK DAUD, SITI NORMA YAAKOB AND MOKHTAR SIDIN JJCA
21 NOVEMBER 1996

Revenue Law *— Estate duty — Appeals and objections — Objection to notice of assessment — Failure to fulfil pre-condition to provide security for estate duty payable before filing application to object — Subsequent filing of summons in chambers for leave to provide security — Whether application to object nullified — Estate Duty Enactment 1941 s 43(1)*

Revenue Law *— Estate duty — Procedure — Objection to notice of assessment — Whether the Supreme Court (Estate Duty) Rules 1954 to apply to High Court cases — Application proceeded by way of originating motion instead of petition — Whether fatal — Supreme Court (Estate Duty) Rules 1954 rr 6 & 9*

The respondent — the executor of the estate of the deceased — filed an originating motion ('the application') against the collector of estate duty ('the collector') objecting to the collector's notice of assessment of the amount of estate duty payable by the estate. The collector filed a notice of preliminary objections in which it was contended, inter alia, that: (i) before any application to review his assessment was made to the High Court, the respondent was obliged by s 43(1) of the Estate Duty Enactment 1941 ('the Enactment') to fulfil the pre-condition that the respondent must provide security for the estate duty payable; and (ii) the application should have been proceeded with by way of a petition under rr 6 and 9 of the Supreme Court (Estate Duty) Rules 1954 ('the 1954 Rules'). Responding to the notice of preliminary objection, the respondent in an attempt to comply with s 43(1) of the Enactment, filed a summons in chambers for leave to provide security as the pre-condition for the hearing of his application. At the hearing of the summons in chambers, the preliminary objections raised in the notice were also argued by the collector. The High Court judge dismissed the collector's preliminary objections and granted leave to the respondent to deposit four title deeds of the lands concerned into court as security before the hearing of the application against the collector's assessment could be heard on its merits, and that the hearing of the application could only be proceeded with after the security deposit had been made. The judge also concluded that the 1954 Rules were not applicable as the title of the Rules and r 6 referred to 'Supreme Court' and all proceedings in the Supreme Court. The collector appealed.

Held, dismissing the appeal:

(1) The subsequent conduct of obtaining the order for security did not have the effect of nullifying the application nor did it bar the respondent from proceeding further with his application, as the merits of the application had not been argued or heard. It would have been otherwise had the application been heard and determined. In any event, the trial judge had taken the precaution of ensuring that the merits of the application would not be heard until after the security ordered to be made had been deposited by the respondent (see p 746H–I).

(2) The trial judge erred in concluding that the 1954 Rules was not applicable in this case. Section 43(1) of the Enactment prescribed that an appeal against the collector's assessment could be challenged 'in the manner and on the conditions directed by rules of court'. The only known rules of court relating to estate duty was the 1954 Rules made by the Supreme Court Rules Committee. The Committee had, in its wisdom, gave prominence to the 1954 Rules by referring to them as the Supreme Court (Estate Duty) Rules 1954 in line with the nomenclature of courts then existing in 1954. Usage of the word 'Supreme Court' in the 1954 Rules should not narrow the application of the 1954 Rules to matters brought before the Supreme Court only. On the contrary, the 1954 Rules in the words of the second proviso to s 43(1) of the Enactment were deemed to be in force with such modifications as may be necessary for the purpose of prescribing the procedure existing in respect of any provision of the Enactment. To that end, the 1954 Rules was applicable to the facts of this case (see p 747D–H).

(3) The fact that the respondent had proceeded by way of an originating motion instead of a petition had not disentitled him to be heard on his application because what was in issue was only the format and not the substance. Rightly, proceedings should commence by way of a petition, but the fact that it did not, did not prejudice the collector in any way. It did not alter the fact that the substance of the application was an objection to the collector's assessment, the very same complaint that would appear had the proceedings been commenced by way of a petition. Since the merits of the application had not yet been heard, and since the preliminary objection was only as to form as opposed to substance, commencing these proceedings in the wrong format was not fatal to the respondent's case (see pp 747I and 748A–B).

[Bahasa Malaysia summary

Penentang — selaku wasi harta pusaka si mati — memfailkan usul pemula ('permohonan tersebut') terhadap pemungut duti harta pusaka ('pemungut duti') membantah notis penaksiran pemungut duti berkenaan dengan jumlah duti harta pusaka yang perlu dibayar oleh estet itu. Pemungut duti memfailkan bantahan permulaan yang mana

di dalamnya ditegaskan, antara lain, bahawa: (i) sebelum apa-apa permohonan untuk mengkaji penaksirannya dibuat kepada Mahkamah Tinggi, penentang adalah berkewajipan di bawah s 43(1) Enakmen Duti Harta Pusaka 1941 ('Enakmen tersebut') untuk memenuhi prasyarat bahawa penentang mesti memperuntukkan jaminan bagi duti harta pusaka yang perlu dibayar; dan (ii) permohonan tersebut sepatutnya dimulakan dengan cara petisyen di bawah kk 6 dan 9 Kaedah-Kaedah (Duti Harta Pusaka) Mahkamah Agung 1954 ('Kaedah-Kaedah 1954'). Sebagai tindak balas kepada notis bantahan permulaan itu, penentang dalam cubaannya untuk mematuhi s 43(1) Enakmen tersebut, memfailkan saman dalam kamar untuk kebenaran bagi memperuntukkan jaminan sebagai prasyarat untuk pembicaraan permohonannya. Pada pembicaraan saman dalam kamar, bantahan permulaan yang dibangkitkan dalam notis itu juga dihujahkan oleh pemungut duti. Hakim Mahkamah Tinggi menolak bantahan permulaan pemungut duti dan memberikan kebenaran kepada penentang untuk mendepositkan empat hakmilik tanah yang berkenaan di mahkamah sebagai jaminan sebelum pembicaraan permohonan tersebut boleh didengar atas merit, dan bahawa pembicaraan permohonan tersebut hanya boleh dimulakan selepas deposit jaminan telah dibuat. Hakim telah menyimpulkan bahawa Kaedah-Kaedah 1954 tidak terpakai kerana tajuk Kaedah-Kaedah itu dan k 6 merujuk kepada 'Mahkamah Agung' dan semua prosiding dalam Mahkamah Agung. Pemungut duti membuat rayuan.

Diputuskan, menolak rayuan:

(1) Tindakan kemudiannya dalam memperolehi perintah untuk jaminan tidak mempunyai kesan membatalkan permohonan tersebut atau pun menghalang penentang daripada meneruskan selanjutnya dengan permohonannya kerana merit permohonan tersebut belum dihujahkan atau dibicarakan. Keadaan mungkin berbeza jika permohonan tersebut telah dibicarakan dan diputuskan. Dalam apa keadaan pun, hakim perbicaraan telah mengambil langkah berjaga-jaga dalam memastikan bahawa merit permohonan tersebut tidak akan dibicarakan sehingga selepas jaminan yang diperintahkan dibuat telah didepositkan oleh penentang (lihat ms 746H–I).

(2) Hakim perbicaraan telah silap dalam memutuskan bahawa Kaedah-Kaedah 1954 tidak terpakai dalam kes ini. Seksyen 43(1) Enakmen tersebut telah menetapkan bahawa sesuatu rayuan terhadap penaksiran pemungut duti boleh dicabar 'dalam cara dan atas syarat-syarat yang diarahkan oleh kaedah-kaedah mahkamah'. Kaedah-kaedah yang diketahui berkaitan dengan duti harta pusaka adalah Kaedah-Kaedah 1954 yang dibuat oleh Jawatankuasa Kaedah Mahkamah Agung. Jawatankuasa itu telah, dalam kebijaksanaannya, menonjolkan Kaedah-Kaedah 1954 dengan merujuk kepada mereka sebagai Kaedah-Kaedah (Duti Harta Pusaka) Mahkamah Agung 1954 selaras dengan tatanama

mahkamah seperti yang ada pada tahun 1954. Penggunaan perkataan 'Mahkamah Agung' dalam Kaedah-Kaedah 1954 tidak sepatutnya menghadkan pemakaian Kaedah-Kaedah 1954 kepada perkara-perkara yang dibawa di hadapan Mahkamah Agung sahaja. Sebaliknya, Kaedah-Kaedah 1954 dalam perkataan-perkataan proviso kedua kepada s 43(1) Enakmen tersebut adalah dianggapkan berkuatkuasa dengan pengubahsuaian sepertimana yang perlu untuk tujuan menetapkan prosedur yang sedia ada berkaitan dengan apa-apa peruntukan Enakmen tersebut. Untuk itu, Kaedah-Kaedah 1954 adalah terpakai bagi fakta-fakta kes ini (lihat ms 747D–H).

(3) Hakikat bahawa penentang telah memulakan tindakan dengan cara usul pemula dan bukannya petisyen tidak menyebabkan beliau tidak layak untuk dibicarakan atas permohonannya kerana apa yang menjadi isu hanyalah format dan bukannya isi permohonan. Secara betulnya, prosiding sepatutnya dimulakan dengan cara petisyen, tetapi hakikat bahawa ianya tidak, tidak memudaratkan pemungut duti dalam apa cara pun. Ia tidak mengubah fakta bahawa isi permohonan tersebut adalah bantahan kepada penaksiran pemungut duti, aduan yang sama yang akan timbul sekiranya prosiding dimulakan dengan cara petisyen. Oleh kerana merit permohonan tersebut belum dibicarakan, dan oleh kerana bantahan permulaan itu hanya terhadap bentuk dan bukannya isi, memulakan prosiding dalam format yang salah tidaklah padah kepada kes penentang (lihat ms 747I dan 748A–B).]

Notes

For cases on estate duty, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1636–1673.

Legislation referred to

Courts of Judicature Act 1964 s 17
Estate Duty Enactment 1941 ss 4, 43(1)
Finance Act 1992 s 46
Rules Committee Ordinance 1948 ss 3, 4
Supreme Court (Estate Duty) Rules 1954 rr 2, 4, 6, 9

Appeal from: Originating Motion No R1–25–117–1994 (High Court, Kuala Lumpur)

Noradidah bte Ahmad (Senior Federal Counsel, Lembaga Hasil Dalam Negeri) for the appellant.
Fiona M Bodipalar (*Sri Ram & Co*) for the respondent.

Cur Adv Vult

Siti Norma Yaakob JCA (delivering the judgment of the court): The only issue raised in the proceedings before us concerns the procedure to be

followed by an accountable person who is aggrieved by the decision of the Collector of Estate Duty ('the collector') with respect to the collector's assessment of the amount of estate duty payable by the accountable person under s 4 of the Estate Duty Enactment 1941 ('the Enactment').

The accountable person in these proceedings is the executor of the estate of one Veeriah s/o Savu, deceased — the respondent before us — who filed Originating Motion No RI–25–117–94 on 26 October 1994 ('the application') against the collector — the appellant before us — objecting to the latter's notice of assessment dated 3 October 1994 of the amount of estate duty payable by the estate. Under the notice, the deceased's estate has been valued at RM2,975,525.14 of which estate duty due and payable has been assessed at RM616,962.52. The respondent's notice of motion seeks two prayers in the alternative, the principal one being that there is no estate duty payable on 17 parcels of land passing on the death of the deceased on 11 April 1983. The alternative prayer seeks to revise the assessment on the ground that the estate duty payable is excessive. The application is supported by the respondent's affidavit affirmed on 17 October 1994.

Together with his affidavit in reply to the application, the collector had also filed a notice of preliminary objection dated 22 February 1995, wherein the collector notified the respondent that at the hearing of the application, he would raise the following preliminary objections:

(1) the procedure adopted by the respondent objecting to the assessment is wrong as it failed to comply with the provisions of s 43(1) of the Enactment read together with rr 6 and 9 of the Supreme Court (Estate Duty) Rules 1954 ('the 1954 Rules');

(2) rule 2 of the 1954 Rules had not been followed; and

(3) the application is premature as the pre-condition required by s 43(1) of the Enactment had not been complied with.

Responding to the notice of preliminary objection, the respondent in an attempt to comply with s 43(1) of the Enactment, filed a summons in chambers dated 13 March 1995 for leave to provide security as the pre-condition for the hearing of his application by the deposit of four title deeds of the lands concerned into court which have a market value of RM668,000. Ahmad Fairuz J (as he then was) heard this summons in chambers and at the same hearing, the preliminary objections raised in the notice were also argued by the collector. On 25 July 1995, the learned judge dismissed the collector's preliminary objections and granted leave to the respondent to deposit four title deeds into court as security before the hearing of the application against the collector's assessment can be heard on its merits, and that the hearing of the application can only be proceeded with after the security deposit had been made.

It is to appeal against this order that the parties are now before us.

The application to review the collector's assessment is made under s 43(1) of the Enactment, which reads as follows:

43(i) Any accountable person aggrieved by the decision of the collector with respect to the amount of estate duty payable ... and whether he is aggrieved on the ground of the value of any property or the rate charged or otherwise, may, on payment of or giving security as hereinafter mentioned for the duty claimed by the collector or such portion of it as is then payable of by him, apply to the court within the time and in the manner and on the conditions directed by rules of court and the amount of duty shall be determined by the said court...

Provided that the Rules Committee established pursuant to s 17 of the Courts of Judicature Act 1964 may by rule prescribe the cases in which in lieu of an application to the court as hereinbefore provided the matter in dispute shall be brought before the court by way of case stated by the collector or by way of a suit brought by the person aggrieved or by such other form of proceedings as the said Rules Committee may prescribe and may make rules governing the practice and procedure to be followed in such cases:

Provided further that until any rules have been prescribed under this subsection, any procedure existing in relation to proceedings in respect of any provisions of the Estate Duty Enactment (Cap 136 of the Revised Edition) shall with such modifications as the Court may consider necessary be deemed to be in force for the purpose of this Enactment.

(ii) ...

(iii) ...

(iv) The court if satisfied that it would impose hardship to require the applicant, as a condition of an application, to pay the whole, or as the case may be, any part of the duty claimed by the collector or of such portion of it as is then payable by him, may allow an application to be brought on payment of no duty or of such part only of the duty as to the court seems reasonable, and on security to the satisfaction of the court being given for the duty or so much of the duty as is not paid, but in such case the court may order interest not exceeding six per cent per annum to be paid on the unpaid duty so far as it becomes payable under the decision of the court.

It is the collector's case that before any application to review his assessment is made to the High Court, the respondent is obliged by s 43(1) to fulfill the pre-condition that the respondent must provide security for the estate duty payable. In this instance, the respondent had failed to do so, but instead filed a subsequent application in the form of a summons in chambers for security to be provided by him. It is the collector's further contention that this failure to obtain an order for security prior to the filing of the application is fatal to the respondent's case.

We do not consider that the subsequent conduct of obtaining the order for security has the effect of nullifying the application or bar the respondent from proceeding further with his application as the merits of the application had not been argued or heard. It would have been otherwise had the application been heard and determined, and in any event, the learned trial judge had taken the precaution of ensuring that the merits of the application will not be heard until after the security ordered to be made has been deposited by the respondent.

A Another issue raised is the format to be used by the respondent when seeking to review the collector's assessment in the High Court. The collector's objection here is that the application should have been proceeded with by way of a petition under rr 6 and 9 of the 1954 Rules and not by way of an originating motion as was done in this case.

B For ease of reference we restate the relevant two rules as follows.

> Application to be by petition
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> 6 Every application shall be made by way of petition addressed to the Judges of the Supreme Court entitled 'In the matter of the Estate Duty Enactment 1941 and in the matter of the Estate of ... deceased ...
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> C Service
>
> 9 The Rules relating to petitions generally in the High Court shall apply to such petitions ...

When considering this objection, the learned judge had concluded that the 1954 Rules is not applicable as the title of the Rules and r 6 refer to D 'Supreme Court' and all proceedings in the Supreme Court.

We consider that the learned judge has erred in deciding as he did for the following reasons.

Section 43(1) of the Enactment prescribes how an appeal against the collector's assessment can be challenged 'in the manner and on the E conditions directed by rules of court'. The only known rules of court relating to estate duty which is a specialized form of taxation on death is the 1954 Rules made by the Supreme Court Rules Committee in the exercise of its powers under s 4 of the Rules Committee Ordinance 1948. The Supreme Court Rules Committee established by s 3 of the same Ordinance and the predecessor of the present Rules Committee, established F under s 17 of the Courts of Judicature Act 1964, had, in its wisdom, gave prominence to the 1954 Rules by referring to them as the Supreme Court (Estate Duty) Rules 1954 in line with the nomenclature of courts then existing in 1954. Usage of the word 'Supreme Court' in the 1954 Rules should not narrow the application of the 1954 Rules to matters brought G before the Supreme Court only. On the contrary, we consider that the 1954 Rules in the words of the second proviso to s 43(1) of the Enactment be deemed to be in force with such modifications as may be necessary for the purpose of prescribing the procedure existing in respect of any provision of the Enactment. To that end, the 1954 Rules is applicable to the facts of this case.

H Having ruled that the 1954 Rules is applicable and that under rr 6 and 9 any review of the collector's assessment before the High Court can only be commenced by way of a petition, does the fact that the respondent had instead proceeded by way of an originating motion disentitle him to be heard on his application?

I We say 'no' as what is in issue is only the format and not the substance. Whilst we do appreciate that rightly, proceedings should commence by way of a petition, the fact that it did not, does not prejudice

the collector in any way. It does not alter the fact that the substance of the application is an objection to the collector's assessment, the very same complaint that would appear had the proceedings been commenced by way of a petition. Since the merits of the application have not yet been heard and since the preliminary objection is only as to form as opposed to substance, we do not consider that commencing these proceedings in the wrong format is fatal to the respondent's case. As for fears expressed by the Senior Federal Counsel that this will create an unhealthy precedent, we also consider those fears to be quite unfounded, as by virtue of s 46 of the Finance Act 1992, the Enactment has since been repealed and estate duty is no longer enforced in this country on the estate of any person dying on or after 1 November 1991. As such, we reckon that the incidence of appeals filed against the collector's assessments to be minimal if not nil.

Whilst objection was placed on the respondent for non-compliance of r 6 of the 1954 Rules, the collector himself cannot run away from the fact that he too had committed a procedural error in failing to comply with r 4 read together with r 2 of the 1954 Rules. We set out rr 2 and 4 for ease of reference.

> Notice of intention to apply
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> 2 Any person aggrieved with sub-s (1) of s 43 of the Estate Duty Enactment 1941 who desires to apply to the Supreme Court in any of the cases mentioned in the said subsection shall within two months from the date of the receipt by him or his solicitor of the decision or claim of the collector give the collector notice in writing of his intention to apply to court and shall set out in such notice the grounds of the proposed application.
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> Written statement of collector
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> 4 The collector shall within two months from the delivery to him of the notice of intention to apply to court send a written statement to the applicant or his solicitor aforesaid whether he has withdrawn the decision or claim against which application is to be made or has determined to maintain the same either in whole or in part, and if in part specifying such part.

In this case, the collector's notice of assessment dated 3 October 1994 was received by the respondent on the same day. On 26 October 1994, the respondent's solicitors gave a notice to the collector of the respondent's intention to appeal against the collector's assessment for the reasons stated in the said notice. Clearly, the respondent had complied with r 2 of the 1954 Rules.

The collector, however, has to date, not responded to the notice and under r 4, he is obliged to give a written statement by way of a reply to the respondent's notice.

However, we consider that the collector's failure to supply the written statement to the respondent cannot bar him from appearing to object to the application as r 5(b) of the 1954 Rules allows the respondent to file the application in the absence of the written statement after the expiry of the two months stipulated by r 4.

A For the reasons that we have given, we had dismissed the collector's appeal, affirmed the decision of the High Court, but made no order as to costs in this appeal.

Appeal dismissed.

B Reported by Jafisah Jaafar

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